Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LOUISIANA BOARD OF REGENTS, LOUISIANA BOARD OF REGENTS, also known as UNIVERSITY OF LOUISIANA SYSTEM BOARD OF TRUSTEES, also known as UNIVERSITY OF LOUISIANA SYSTEM; STATE OF LOUISIANA; WILLIAM CARVEL FOWLER, individually; BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, formerly known as BOARD OF TRUSTEES, DOING BUSINESS AS LOUISIANA TECH UNIVERSITY,

Petitioners,

v.

WENDY RENEE BENNETT-NELSON and JOY MARIE BOYKIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can Congress condition federal financial assistance to states upon a waiver of sovereign immunity under the spending clause and, if so, to what extent?

II. Do state agencies voluntarily waive sovereign immunity when they are not direct beneficiaries of federal financial assistance?

III. Does 42 U.S.C. §2000d-7 unconstitutionally condition the receipt of federal financial assistance upon the states' waiver of sovereign immunity?

PARTIES TO THE PROCEEDING

Petitioners are Louisiana Board of Regents, Louisiana Board of Regents, also known as University of Louisiana System Board of Trustees, also known as University of Louisiana System; State of Louisiana; William Carvel Fowler, Individually; Board of Supervisors for the University of Louisiana System, formerly known as Board of Trustees, doing business as Louisiana Tech University.

Respondents are Wendy Bennett-Nelson and Joy Marie Boykin.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Bennett-Nelson v. Board of Regents*, 431 F.3d 448 (5th Cir. 2005) and is reprinted at App. 1. The District Court issued one opinion that was appealed to the Fifth Circuit dated July 23, 2003, which is reprinted at App. 16.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on November 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. §1251 and §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, §8, cl. 1:

The Congress shall have the power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts, and to provide for a common Defense and general welfare of the United States.

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

citizens of another State, or by Citizens of any Foreign State.

U.S. Const. amend. XIV, §5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §2000d-7(a). Civil Rights and Remedies Equalization Act.

A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681, et seq.), the Age Discrimination Act of 1975 (42 U.S.C. §6101, et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.) or the provisions of any other Federal Statute prohibiting discrimination by recipients of Federal financial assistance.

29 U.S.C. §794. Nondiscrimination under Federal grants and programs.

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed

> regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

STATEMENT OF THE CASE

A. Statement of Facts

Louisiana Tech University ("LaTech") is a public institution of higher learning established by the laws and constitution of the State of Louisiana, and is governed by the Board of Supervisors for the University of Louisiana System. La. R.S. 17:3217, 17:3351 et seq. The Board of Regents, pursuant to La. Constitution, Article 8, §5, is responsible for the oversight of degree programs offered at the institutions and devising a master plan for education of the citizens of the State of Louisiana through its public institutions.

Wendy Bennett-Nelson and Joy Marie Boykin are no longer enrolled at LaTech. Both plaintiffs have hearing impairments, which required the students to seek special assistance from LaTech.

LaTech, complying with Americans with Disabilities Act standards and Louisiana Disability Act standard, provided note takers and interpreters for classes in which the students were enrolled. LaTech does not have qualified interpreters on its faculty or staff and therefore, must contract with outside sources to provide the assistance needed by the plaintiffs. LaTech, to accommodate the needs of the students, contracted with the closest and most qualified company,

Visual Communications, which is located several hours away from the campus, to provide interpreting services to meet the needs of the students. Because of the lack of qualified interpreters in the immediate area, on limited instances the interpreters from the company were unavailable. In addition to the interpreting services provided by Visual Communications, LaTech also hired note-takers and/or scribes for the classes in which the plaintiffs were enrolled. The note-takers were to be present in the classes as if they were registered students and take detailed notes on the lectures given by the professors. The note-takers/scribes are students paid by the University through the work-study program.

B. The District Court Opinion and the Panel Opinion

The district court dismissed all claims against the State, holding that these claims were barred under the Eleventh Amendment.[1] Specifically, the court held that (1) Congress did not validly abrogate Louisiana's sovereign immunity via either Title II of the ADA or §504 of the Rehabilitation Act; and (2) the University had not waived its immunity from suit under §504.[2]

The Fifth Circuit's panel opinion reversed and remanded the decision of the District Court, citing the recent en banc hearing of *Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir. 2005) for authority regarding the

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[1] The District Court also dismissed the appellants' Louisiana state law claims as insufficiently pled.

[2] *Bennett-Nelson v. Board of Regents*, 431 F.3d 448, 450 (5th Cir. 2005), reprinted at App. 2.

State waiving its sovereign immunity with acceptance of federal financial assistance. In its finding, the panel stated that the University, as a recipient of federal financial assistance, has waived its Eleventh Amendment immunity.[3] The panel found that Congress has authority under the Spending Clause to condition receipt of federal aid upon a waiver of sovereign immunity, relying on its en banc opinion in *Pace*.[4] Additionally, the court found that, although the State did not directly receive the federal aid, it was the beneficiary of such monies.[5]

REASONS FOR GRANTING THE WRIT

There are three separate and independent reasons why this writ of certiorari should be granted. First, the federal government has conditioned receipt of millions of dollars in federal aid earmarked for students upon a state's waiver of sovereign immunity, but this Court has never ruled on whether and under what circumstances such conditional waivers can be applied to the states under the Spending Clause. Second, the present jurisprudence among the circuits on spending clause cases offer no guidance to the states as to the limits on Congress with respect to conditional spending. Third, the present Spending Clause jurisprudence has violated the unconstitutional conditions doctrine in that the amount of federal financial

[3] Id. at 449, App. 2.

[4] Id. at 453, citing *Pace v. Bogalusa City School Board*, 403 F.3d 272, 276 (5th Cir. 2005) (en banc).

[5] Id.

assistance to be withheld ostensibly by the Federal Government is coercive, leaving the states compelled to accept the funds.

I. CAN CONGRESS CONDITION FEDERAL FINANCIAL ASSISTANCE TO STATES UPON A WAIVER OF SOVEREIGN IMMUNITY UNDER THE SPENDING CLAUSE AND, IF SO, TO WHAT EXTENT?

Federal grants to states and localities have increased nearly 40,000% over the past sixty years, growing from 991 million in 1943 to 18.173 billion in 1968 and 387.281 billion in 2003.[6] While federal financial assistance constitutes an increasingly large portion of each State's revenue, none of this money is offered to states unconditionally.[7] Instead, Congress uses federal financial assistance to achieve numerous policy ends indirectly through the Spending Clause that it could not accomplish directly. For example, Congress has used its Spending Power to prohibit federal contractors from discussing abortion while working at federally-funded health clinics,[8] to ensure that federal funds are not used to support art that is deemed

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[6] See, Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970, pt 2, at 1125 (1943 and 1968 statistics); Statistical Abstract of the United States, 2004-2005, at 266 (2003 statistics) (tbl. 424) (124th ed. 2004-2005) (http://www2.census.gov/prod2/statcomp/documents/CT1970p2-12.pdf).

[7] Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum. L. Rev. 1911, 1918 (1995).

[8] *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

indecent,[9] and to achieve a national speed limit,[10] a national drinking age[11] and numerous other objectives.

Congress' power to abrogate sovereign immunity under Article I was widely accepted as a result of earlier opinions of this Court. Also in these earlier decisions came the belief that Congress could regulate the states as it chose. However, in 1995 this court, "checking" the legislative branch of government (Congress), began to limit its powers. In *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), this court formally "checked" Congress and began to re-balance the levels of government by preserving this country's fundamental principle of dual sovereignty. Subsequent to *Lopez*, this court further re-established the balance between the sovereign states and federal government in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in which this court held Congress may not use its Article I powers, including the Commerce Clause, to abrogate state sovereign immunity; instead, abrogation can only occur under Section 5 of the Fourteenth Amendment. Since *Seminole Tribe*, this court has limited Congress' ability to abrogate under Section 5 of the Fourteenth Amendment on many occasions.[12]

The Spending Clause, Congress' new weapon of choice in tearing down the barriers of the states' autonomy, has become the subject of much litigation, resulting in conflicts

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[9] *NEA v. Finley*, 524 U.S. 569, 587-88 (1988).

[10] *Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989).

[11] *South Dakota v. Dole*, 483 U.S. 203 (1987).

[12] See, e.g., *Bd. of Trustees of Univ. Al. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

among the circuits. This Court, however, has vigorously pursued and maintained the barriers as evidenced by its jurisprudence. However,[13] recently Congress has resorted more readily to the Spending Clause, to indirectly achieve the same abrogation of the Eleventh Amendment immunity that could not be directly achieved.[13]

> "It is implausible to presume that 'the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its power . . . they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to nor restriction save such as are self-imposed.' "[14]

The Spending Clause, while accepted as a means through which Congress may legislate to entice a certain behavior from the states, may not go without limits. This Court in *New York v. U.S.*, 505 U.S. 144 (1992), stated that the condition must bear a relationship to the spending programs; otherwise, "the spending power could render academic the Constitution's other grants and limits on federal authority." Several cases have come before this court; in each instance the threshold of Congress' ability to legislate via the Spending Clause increased. In *South*

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[13] *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1171 (D.C. Cir. 2004).

[14] Citing *United States v. Butler*, 297 U.S. 1 (1936); and *Commonwealth of Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570-571 (4th Cir. 1997) (Luttig dissenting), (superceded by statute) ("In the end, this case is about the permissible reach of federal power under the Spending Clause in a time when the several States have become increasingly dependent upon the federal government for funds . . . ").

Dakota v. Dole, 483 U.S. 203, 217 (1987), Justice O'Connor voiced her concerns of this increasing threshold:

> "[I]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the federal government, is that the Spending Clause gives power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self imposed."

Only this court is empowered with the means to "check" Congress as it no longer imposes self restrictions in legislating in the area of Spending Clause. In addition to *Dole*, several other cases have come before this court where hundreds of millions of dollars were at stake, and this court seemed fit to determine that, while such amounts may have significant impact on the state's budget, the enticement does not equal coercion.[15]

This case squarely presents the opportunity to examine the limitation of Congress' ability to enforce policy objectives indirectly through the Spending Clause. Congress' spending powers have long gone unchecked. This Court has the opportunity to firmly establish dual sovereignty as a fundamental principle not to be trampled as Congress goes unchecked. Louisiana urges this court to find that Congress cannot condition substantial funding for education upon states waving their immunity to claims under the Rehabilitation Act.

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[15] *Ark. Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001).

II. DO STATE AGENCIES VOLUNTARILY WAIVE SOVEREIGN IMMUNITY WHEN THEY ARE NOT DIRECT BENEFICIARIES OF FEDERAL FINANCIAL ASSISTANCE?

Louisiana Tech University ("LaTech"), does not receive direct federal funding and is therefore immune from suit in federal court under the Rehabilitation Act ("RA") and Title II of the Americans with Disabilities Act ("ADA"). The trial court's Memorandum Ruling, filed July 23, 2003, states in part, at App. 21, "plaintiffs have provided this Court no evidence that the University of Louisiana System, the Board of Regents or Louisiana Tech accepted any federal funds under §504 of the Rehabilitation Act."

The Supreme Court has addressed the issue of entities receiving federal financial assistance on more than one occasion.[16] This Court's most recent opinion in *NCAA v. R.A. Smith*, 525 U.S. 459 (1999), held that "[a]pplication of §504 [Rehabilitation Act] to all who benefitted economically from federal assistance, we observed, would yield almost limitless coverage. . . . We conclude that the statute covers those who receive the aid, but does not extend as far as those who benefit from it."[17]

The Fifth Circuit relied in part on *NCAA v. Smith* to support reasoning that §504 is indistinguishable from Title IX. See, *Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448, 453, at App. 9-10. However, the proposition upon which they rely pertains to the NCAA's

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[16] See, *Grove City College v. Bell*, 465 U.S. 555, 563-570, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984), and *Paralyzed Veterans*, 477 U.S., at 603-612, 106 S. Ct. 2705.

[17] *NCAA*, 525 U.S. at 467 (1999), citing *Paralyzed Veterans*, 477 U.S. 597, at 608.

receipt of designated federal funds for entities subject to Title IX, and is distinguishable from those under the RA. The nexus between the receipt of educational funds and Title IX is very clear. Title IX's purpose is to create equality among the genders in pursuit of education. Furthermore, the regulations which accompany the enforcement of Title IX identify what funds will be subject to its compliance.[18] There is no nexus between the funds received by the State in the instant case and the requirements of §504. More importantly, there is no identifiable method by which the State can reliably determine what funds would subject it to §504. Alternatively, should this Court determine that the conditional waiver is permissible, the far reaching effect would be "compulsion."

The federal work study program created at LaTech is parallel to that of *U.S Department of Transportation v. Paralyzed Veterans*, 477 U.S. 597 (1986). In this particular case, airport operators accepted federal funds under the RA and often used them for runway construction, as well as building enhancements for the disabled. The plaintiffs in this case sued the airlines, claiming that they indirectly benefitted from the funds, thus making them liable for RA even though they were not direct beneficiaries of the funds. The court held, as noted supra, that §504 of the RA did not apply to commercial airlines and that such tangential relationship would make the coverage of the RA limitless. In the instant case, LaTech, much like the airlines, merely indirectly benefitted from the programs established for the students who were the direct beneficiaries of the federal funding.

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[18] 34 C.F.R. §§106.2, 106.2(h).

LaTech has not voluntarily waived its Eleventh Amendment immunity. Two cases recently decided by the Fifth Circuit have directly addressed the issue of waiver of Eleventh Amendment immunity. The first, *Pederson v. Louisiana State Univ.*, involved an action under Title IX, in which the plaintiffs, female students, claimed discrimination resulting from LSU's failure to create more intercollegiate athletic sports for women.[19] The second, *Pace v. Bogalusa City School Bd.*,[20] involved a high school student who was developmentally delayed, confined to a wheelchair, and suffered from cerebral palsy and bladder incontinence, and who brought claims under the Individuals with Disabilities Education Act ("IDEA"), Title II of the ADA and §504 of the RA.

The plaintiffs in *Pederson* asserted that LSU's acceptance of federal education money waived its Eleventh Amendment immunity.[21] The Court concluded that Congress permissibly conditioned a state university's receipt of Title IX funds on an unambiguous waiver of Eleventh Amendment immunity and that, in accepting such funding, the university consented to litigate in federal court.[22] The Court in reaching this decision adopted the holding and all the reasons set forth in *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999).[23]

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[19] *Pederson*, 213 F.3d at 864.

[20] *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir. 2003).

[21] Id. at 875.

[22] *Pederson*, 213 F.3d at 875, citing *Litman v. George Mason University*, 186 F.3d 544, 555 (4th Cir. 1999).

[23] "We cannot improve on the work done by the court in *Litman*, and we therefore simply adopt its holding for all the reasons supplied in its well crafted opinion." Id. at 875-76.

The Fourth Circuit's opinion in *Litman* discussed the two ways a state may waive its immunity.[24] First, it may "directly and affirmatively waive its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly 'specifies the state's intention to subject itself to federal court.'"[25] Second, a state may waive its immunity by voluntarily participating in federal spending programs when Congress expresses "a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity."[26] The test for finding such waiver "is a stringent one."[27] "The mere receipt of federal funds cannot establish that a state has consented to suit in federal court."[28]

The *Litman* Court recognized that Congress has the power to impose conditions on receipt of federal "gifts" pursuant to the Spending Clause. However, the State must know what funds will be lost should it choose not to accept Congress' offer.

> Because of the mutuality required in a contractual relationship of this type – the federal grant in exchange for state agreement to attached conditions – the legitimacy of the attached conditions rests on whether the State voluntarily and knowingly accepts the terms of the "contract". . . .

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[24] *Litman v. George Mason University*, 186 F.3d 544, 550 (4th Cir. 1999).

[25] Id., quoting *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241.

[26] Id., quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247.

[27] *Pederson*, 213 F.3d at 875, quoting *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673.

[28] *Litman*, 186 F.3d at 551, quoting *Atascadero*, 473 U.S. at 246-47.

> Thus, Spending Clause legislation . . . presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds.[29]

The *Litman* Court, realizing how far Congress may use its Spending Power, applied five limitations set forth in this Court's opinion in *South Dakota v. Dole*,[30] to determine whether there was a valid exercise of power:

1. The exercise of the spending power must be for the general welfare;

2. If the grant or expenditure is, when made to the states, accompanied by conditions, the conditions must be stated "unambiguously";

3. Any conditions imposed must "bear some relationship to the purpose of the federal spending" so that a reasonable nexus exists between the two;

4. The grant or expenditure and the condition attached to it may not violate any independent constitutional prohibition; and

5. The financial inducement offered by Congress must not be "so coercive as to pass the point at which pressure turns into compulsion."[31]

These conditions, set forth in *Dole* support the proposition that, when the funds are offered to the state, (a) the

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[29] *Litman*, 186 F.3d at 552.

[30] *South Dakota v. Dole*, 483 U.S. 203, 207-11.

[31] *Litman*, 186 F.3d at 552-53.

state must have an opportunity to reject them, and (b) the statute must identify the funds received by the state that are subject to the condition. The state made several arguments in *Pederson* to demonstrate that their Eleventh Amendment immunity was not waived.[32] The Court in response to these arguments stated that, although 42 U.S.C. §2000d-7(a)(1) does not use the words "waiver" or "condition," it unambiguously provides that a State by agreeing to receive federal educational funds under Title IX has waived sovereign immunity. Title IX as a federal spending program "operates much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[33]

The Fifth Circuit in *Pace* further extended the position of *Pederson* to claims brought under §504 of the RA.[34] The Court opined that Congress enacted §504 of the Rehabilitation Act pursuant to its authority under the Spending Clause and clearly conditioned the receipt of federal funds on compliance with the Act's provisions.[35] The ADA, on the other hand, is a purely prescriptive statute that does not in any way condition the receipt of federal funds on compliance with the ADA or waiver of state sovereign immunity.[36]

In the case of LaTech, which does not directly receive the conditioned federal funds, it fails the requirement of knowledge of funds conditioned. LaTech enrolled students

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[32] *Pederson*, 213 F.3d at 876.

[33] Id., quoting *Litman*, 186 F.3d 551.

[34] *Pace*, 325 F.3d 615.

[35] Id.

[36] Id.

who on their own decision and initiative sought federal financial assistance for their education and benefit. Such action by the students does not waive LaTech's immunity. The *Dole* factors require that there be some nexus between the federal spending program and the condition placed upon the entity. The Ninth Circuit Court of Appeals in *Douglas v. California Dept. of Youth Authority*, and *Lovell v. Chandler*, held where a state accepts federal funds **under** the RA, immunity from suit in federal court is waived.[37] In each of these cases, the state accepted funds specifically granted **under** the RA and defendant did not dispute such fact. In the instant case, there was no federal spending program involving RA funds that LaTech had the opportunity to accept or reject. LaTech never received funding under the RA. Additionally, should this court determine that LaTech is a recipient of federal grants, there is not a sufficient nexus between the funding and the statute; thus, it fails to meet the test imposed by *Dole* and *Litman*. Lastly, if this Court determines that acceptance of **any** federal financial assistance constitutes a valid waiver, all notions of fundamental and constitutionally guaranteed dual sovereignty would effectively be repealed.

III. DOES 42 U.S.C. §2000d-7 UNCONSTITUTIONALLY CONDITION THE RECEIPT OF FEDERAL FINANCIAL ASSISTANCE UPON THE STATES' WAIVER OF SOVEREIGN IMMUNITY?

This Court has held that "even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the

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[37] *Douglas v. California Dept. of Youth Authority*, 271 F.3d 812 (9th Cir. 2001) and *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002).

benefit may be conditioned on the surrender of a constitutional right."[38] Just as "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program," *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981), a state should have a similar right of Eleventh Amendment immunity. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999).

This Court has applied the unconstitutional conditions doctrine to the exercise of free speech and the right of lawyers to practice. In *Federal Communications Commission v. League of Women Voters of Calif.*, 468 U.S. 364 (1984), this court held that Congress did not have authority to condition the receipt of federal funds on the waiver of the First Amendment right to speech, and, in *Legal Service Corp. v. Velazquez*, 531 U.S. 533 (2001), this court held Congress could not condition funding for legal services to the indigent on lawyers refraining from challenging the constitutionality of federal statutes.

When applying the unconstitutional conditions doctrine, this court has focused upon the right at issue and not the party challenging the statute. The Fifth Circuit in *Pace v. Bogalusa*, 403 F.3d 272 (5th Cir. 2005) and the Third Circuit in *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161 (3rd Cir. 2002), erred by focusing upon the fact that a state as opposed to a private individual was the aggrieved party. This Court has not made such a distinction and has instead focused upon the right at issue. In *Bd. of County Commissioners, Wabaunsee County,*

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[38] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996).

Kansas v. Umbehr, 518 U.S. 668 (1996); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) this Court's inquiries focused on the benefit being conferred and the constitutional right at issue. This Court has never limited this doctrine to exclude states.

Congress cannot condition the receipt of a benefit upon an infringement of a constitutional right. As this Court explained, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program."[39] Congress has managed to accomplish this goal in the Civil Rights Remedies Equalization Act, 42 U.S.C. §2000d-7. This statute conditions the receipt of federal financial assistance upon the requirement that States waive sovereign immunity, a conditional right. The "unconstitutional conditions" doctrine prohibits this type of condition on federal financial assistance.

The State of Louisiana urges this Court to find that Congress cannot condition a substantial benefit of hundreds of millions of dollars in educational funds upon the waiver of state immunity. It is time this Court place restraints upon the use of Spending Clause legislation and stop Congress' abuse of this power. On several occasions, this Court has ruled that certain conditions placed upon federal aid may be unconstitutionally coercive; yet, it has not articulated any standards. Here, this Court is given the opportunity to announce a test and resolve the issue.

In *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), this Court recognized that Congress may place conditions upon

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[39] *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981).

federal financial assistance so long as the conditions are not coercive. This Court cautioned that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." Id., quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). Most recently, in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999), the Court recognized that coercion continues to be a limitation upon the spending power. However, neither *Dole* nor *College Savings* contained a test for a court to apply in determining if a statute is coercive. As a result the Circuit Courts of Appeals have looked to the amount of funding potentially affected by the waiver and have determined that "while politically painful," it has not passed the point at which pressure turns into compulsion. See *Jim C. v. Arkansas Dep't of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000). Opinions of this nature would leave Congress free to condition hundreds of millions of dollars of federal funding on the willingness of the states to waive their sovereign immunity.

The Circuit Courts of Appeals have no clear guidance from this Court in application of the coercion test. Several Circuit Courts of Appeals have taken to employing unique methods of determining whether coercion exists in a federal spending program. The Fifth Circuit's approach is so radical that no other circuit has followed the concept utilized in *Pace*. The Fifth Circuit opined that "if the clear statement rule is satisfied, a State's actual acceptance of clearly conditioned funds is generally voluntary."[40] The

[40] *Pace*, 403 F.3d at 279 (en banc).

Fifth Circuit recognized an exception to this rule "if the spending program itself is deemed 'coercive.' "[41]

The Eighth Circuit has refused to find that the level or amount of funding could constitute impermissible coercion. In *Jim C.*, the Eighth Circuit refused to find that the level or amount of funding could constitute impermissible coercion and held that $250 million in educational funds or 12% of Arkansas' education budget is not unconstitutionally coercive.[42] Also, in *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003), the court held $557 million or 60% of Nebraska's Department of Social Services budget was not unconstitutionally coercive.

The Ninth and Tenth Circuits found that the coercion theory is suspect. In *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000), "the coercion theory is unclear, suspect and has little precedent to support its application." In *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), cert. denied, 533 U.S. 806 (1997), the Court held that "[t]o the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record." There is wide disparity in the way the Circuit Courts of Appeals analyze whether spending conditions are unconstitutionally coercive. Therefore, this Court should consider the issue and hold that it is unconstitutionally coercive to condition the receipt of federal aid upon a state's waiver of sovereign immunity where the

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[41] Id.

[42] *Jim C. v. Ark. Dep't of Educ.*, 235 F.3d 1079, 1982 (8th Cir. 2000) (en banc), cert. denied, *Arkansas Dep't of Education v. Jim C.*, 533 U.S. 949 (2001).

state is not the direct beneficiary of the federal funding in question.

CONCLUSION

This case presents for decision an important evolving question of constitutional law that directly affects claims that may be asserted against all states. More importantly, this case presents this Court with the opportunity to protect what little vestiges of state sovereign immunity remain, if any. Congress has demonstrated no self restraint in using its weapon, conditional federal spending, against the states to achieve what it is barred from doing under the Constitution of these United States. This Court in *Dole* set forth coercion as impermissible in spending clause legislation. Now few, if any, circuits use this reasoning in determining the constitutionality of conditional federal spending. Therefore, this Court should use this case as an opportunity to establish a test to determine when conditional federal spending is coercive.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-31198

WENDY RENEE BENNETT-NELSON;
JOY MARIE BOYKIN,

Plaintiffs-Appellants,

versus

LOUISIANA BOARD OF REGENTS,
Etc.; ET AL.,

Defendants,

LOUISIANA BOARD OF REGENTS, also known as University of Louisiana System Board of Trustees, also known as University of Louisiana System; STATE OF LOUISIANA; WILLIAM CARVEL FOWLER, Individually; BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, formerly known as Board of Trustees, doing business as Louisiana Tech University

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport
USDC No. 5:01-CV-2166

(Filed November 28, 2005)

Before JOLLY, HIGGINBOTHAM and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Two hearing impaired students at Louisiana Tech University ("the University"), Wendy Renee Bennett-Nelson and Joy Marie Boykin ("the appellants"), brought this action under Title II of the Americans with Disabilities Act of 1990 ("ADA") and § 504 of the Rehabilitation Act of 1973. The appellants alleged that the University denied them equal access to education by failing to provide educational aids and services, such as sign language interpreters and note takers, in a timely and effective manner. The district court dismissed the appellants' claims, holding that they were barred by the immunity from suit in the federal courts granted to Louisiana by the Eleventh Amendment.

On appeal, the appellants contend (1) that the University has waived its immunity from suit under § 504 of the Rehabilitation Act by accepting federal funding; and (2) that Congress has validly abrogated Eleventh Amendment immunity from suit under Title II of the ADA. We agree that the University, as a recipient of federal financial assistance, has waived its Eleventh Amendment immunity. We therefore need not go further to address the abrogation issue. Accordingly, we REVERSE and REMAND for further proceedings.

I

The facts of this case are uncomplicated and largely undisputed. Louisiana Tech University is a public university governed by the Board of Supervisors for the University of

Louisiana System. Although its main source of funding is the State of Louisiana, the University also distributes approximately twenty-one million dollars in federal financial aid to students each year. The University's primary sources of federal funds are the Federal Work Study program and the Pell Grant program.

The appellants were enrolled as full-time students at the University. Because of their hearing impairments, they requested that the University's Office of Disabled Student Services provide certain accommodations. In particular, the appellants requested sign language interpreters and note takers for the classes in which they were enrolled, as well as certain study aids.

Before the district court, the appellants alleged that, although the University did provide the requested assistance "on rare occasions", it routinely failed to do so. Thus, the appellants contended, the University failed to make reasonable accommodations for their disabilities, as required under Title II of the ADA and § 504 of the Rehabilitation Act. *See* 42 U.S.C. § 12131(2); 28 C.F.R. § 42.521(a). The University responded that the accommodations it provided were adequate, and that Louisiana's Eleventh Amendment sovereign immunity barred the appellants' claims.

Upon a motion by the defendants, the district court dismissed all of the appellants' claims against the Louisiana Board of Regents, the Board of Supervisors for the University of Louisiana System, the University, and the State of Louisiana (hereinafter, collectively, "the Louisiana appellees"), holding that these claims were barred under

the Eleventh Amendment.[1] Specifically, the court held (1) that Congress did not validly abrogate Louisiana's sovereign immunity via either Title II of the ADA or § 504 of the Rehabilitation Act; and (2) that the University had not waived its immunity from suit under § 504. This appeal followed.

II

The sole issue before us is whether Louisiana's Eleventh Amendment sovereign immunity bars the appellants' claims under the ADA and the Rehabilitation Act. Our review is *de novo*.[2] Our inquiry begins, as always, with the text of the Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. As we explained in *Pace v. Bogalusa City School Board*, the core function of the

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[1] The district court also dismissed the appellants' Louisiana state law claims as insufficiently pled. *See* FED.R.CIV.P. 8(a). Normally, dismissal for failure to satisfy the requirements of Rule 8 is without prejudice, and we find nothing in the district court's memorandum ruling to indicate that it intended otherwise. Thus, as the appellants are free to reassert their state law claims on remand, we need not decide whether dismissal of said claims was in error.

[2] The State moved for dismissal under FED. R. CIV. P. 12(b)(6) and 12(c). We review dismissal under either rule *de novo*, applying the same standard as the district court, and asking whether "it appears certain that the plaintiff cannot prove any set of facts . . . which would entitle her to relief". *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348, 351 (5th Cir. 2003).

Amendment is to bar the authority of federal courts to litigate suits brought by citizens against the states. *See* 403 F.3d 272, 276 (5th Cir. 2005) (en banc). Although, by its express terms, the Amendment "bar[s] only federal jurisdiction over suits brought against one State by citizens of another State or foreign state",[3] the Supreme Court has long held that it also precludes jurisdiction where, as here, a citizen brings suit against her own state in federal court.[4] *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

There are two exceptions to the rule of sovereign immunity. First, a state may waive its immunity by consenting to suit. *See, e.g., Coll. Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)). Second, Congress may abrogate state sovereign immunity pursuant to the enforcement power conferred by § 5 of the Fourteenth Amendment. *See id.* The appellants contend that the University – and by extension, the remaining Louisiana appellees – have waived their immunity from suit under § 504, and that Congress has validly abrogated state sovereign immunity from suit under Title II of the ADA. We address these contentions in turn.

A

The appellants first contend that the University has waived its Eleventh Amendment immunity from suit

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[3] *Id.*

[4] Further, the Eleventh Amendment protects "state agents and state instrumentalities" as well as the states themselves. *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

under § 504 of the Rehabilitation Act by accepting federal financial assistance. Section 504 provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .

29 U.S.C. § 794(a). A separate provision, 42 U.S.C. § 2000d-7, conditions a state's receipt of federal funds on its waiver of Eleventh Amendment immunity to actions under § 504.[5] Our task, then, is twofold. First, we must decide whether the University is a "program or activity receiving federal financial assistance" within the meaning of § 504, such that the waiver condition found in § 2000d-7 applies. If it is, we must determine whether, under the multi-factor test set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987), the condition represents a constitutionally permissible exercise of Congress' spending power.

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The Louisiana appellees contend, and the district court agreed, that the University is not a "program or activity receiving Federal financial assistance" within the meaning of § 504, and thus, does not fall within the waiver

[5] 42 U.S.C. § 2000d-7 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance".

provision of § 2000d-7. As a preliminary matter, we note that a "program or activity" is defined as "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance". 29 U.S.C. § 794(b)(2)(A). Thus, the precise question before us is whether the University – that is, any department or other subdivision of the University – is a recipient of federal funds.

The University concedes that enrolled students "receive federal funds earmarked for educational expenses". In particular, the University's Director of Student Financial Aid testified that the University receives "somewhere in the neighborhood of twenty-one [to] twenty-two million dollars" in federal financial aid annually. A significant portion of this aid comes from the Federal Work Study program, under which the "federal government . . . provide[s] the university a fund of federal money that must be matched by university money[,] which is then used [to pay] student workers".

Moreover, approximately five million dollars of aid comes via the Pell Grant program, under which the federal government "writes a check . . . directly to Louisiana Tech University", and funds are "funneled through" the University "for distribution to the student". Because these funds are earmarked for educational purposes, the University will typically distribute the money directly to a student's account with the school, where it is applied toward expenses such as tuition, room and board, and meals.

The crux of the University's argument is that, because it is the student who ultimately receives the above-described federal funds, the University is not a recipient of

federal aid within the meaning of § 504 and § 2000d-7, and thus, has not waived its Eleventh Amendment immunity. The University's argument, however, is effectively foreclosed by the Supreme Court's holdings in *Grove City College v. Bell*, 465 U.S. 555 (1984), and *U.S. Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

In *Grove City*, the Supreme Court held that the petitioner, a private college, was a recipient of federal funds within the meaning of § 901(a) of Title IX,[6] which prohibits sex discrimination in "any education program or activity receiving Federal financial assistance". In so holding, the Court observed that, although the college received no direct federal aid, "the language of § 901(a) contains no hint that Congress perceived a difference between direct institutional assistance and aid received by a school through its students". 465 U.S. at 564. The Court further observed that "the economic effect of direct and indirect assistance often is indistinguishable", particularly insofar as federal aid "effectively supplements [a college's] own financial aid program". *Id.* at 565.

Later, in *Paralyzed Veterans of America*, the Court held that, although airlines benefited from federal financial assistance given to airport operators, they were not recipients of federal aid under § 504. *See* 477 U.S. 597. The Court distinguished *Grove City* by noting that, in that case, "it was clear . . . that Congress' intended recipient was the college, not the individual students to whom the checks were sent from the Government". *Id.* at 606-07. By contrast, in *Paralyzed Veterans of America*, the airport

[6] 20 U.S.C. § 1681(a).

operators were the intended recipients and the airlines merely beneficiaries. Thus, under *Grove City* and *Paralyzed Veterans of America*, the relevant question is not whether the University passes federal funds through to students – who, it should be noted, typically pass them back to the University in the form of tuition payments and other expenses – but whether the University is an "intended recipient" of the funds Congress has appropriated.

In this case, just as in *Grove City*, Congress has expressly stated that one purpose of the relevant student aid provisions is "to assist in making available the benefits of postsecondary education to eligible students . . . by . . . *providing assistance to institutions of higher education*". 20 U.S.C. § 1070(a)(5) (emphasis added); *see also* 465 U.S. at 566. Moreover, the practical effect of the federal assistance in this case is precisely the same: it serves to supplement the University's financial aid, thereby enhancing the University's ability to enroll and educate financially needy students.

The Louisiana appellees contend that this case is distinguishable from *Grove City*, insofar as it involves a different statutory provision – § 504 of the Rehabilitation Act, as opposed to § 901(a) of Title IX. We cannot see that such a distinction is at all germane. The relevant portions of the two statutes are identical – both bar discrimination by entities "receiving Federal financial assistance" – and the appellees have cited us to no authority suggesting that Congress intended the term to carry a different meaning in § 504 than it does in § 901(a).[7] If there is any relevant

[7] The Supreme Court has observed that "[t]he scope of several other federal antidiscrimination measures [including § 504 and Title

(Continued on following page)

distinction between the instant case and *Grove City*, it is that the argument for finding that the institution is an "intended recipient" is stronger here, as the University actively participates in both the Federal Work Study and Pell Grant programs.[8] By contrast, Grove City College consistently refused state and federal financial aid, receiving it only indirectly from students who had independently sought and received Basic Education Opportunity Grants. *See* 465 U.S. at 559.

In sum, here, no less than in *Grove City*, the University is an intended recipient of federal financial assistance. Accordingly, for that reason, it is subject to the requirements of § 504 of the Rehabilitation Act.

2

Because the University is a recipient of federal assistance, we must determine, based on the five-factor test set forth in *Dole*, whether the waiver condition in § 2000d-7 represents a constitutionally permissible exercise of Congressional power under the Spending Clause. We need not linger long on this question, as it was recently addressed in our en banc decision in *Pace*.

In *Pace*, we concluded that a school board's receipt of federal education funds constituted a knowing and voluntary waiver of sovereign immunity as to claims under

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VI] is defined in nearly identical terms" to that of Title IX. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 466 n. 3 (1999).

[8] To participate in Federal Work Study and similar programs, an institution must fulfill certain conditions, such as applying, being certified, and entering into a written program participation agreement. *See* 34 C.F.R. §§ 673.3, 668.14.

§ 504. *See* 403 F.3d at 280-87. Specifically, we noted that the waiver language of § 2000d-7 was "unambiguous", that the condition was sufficiently related to the federal interest in the program funded, and that it did not rise to the level of coercion. *See id.* As such, we held that the waiver condition set forth in § 2000d-7 is a constitutionally permissible exercise of Congress' spending power.[9]

We are, of course, bound by this court's prior en banc decision. Accordingly, we hold that the University – and the remaining Louisiana appellees – have waived their Eleventh Amendment immunity from suit under § 504 of the Rehabilitation Act and, concomitantly, that the district court erred in dismissing the appellants' § 504 claims.

B

The appellants further contend that Congress has abrogated Louisiana's Eleventh Amendment sovereign immunity from suit under Title II of the ADA. In *Reickenbacker v. Foster*, we rejected this argument, holding that enactment of Title II did not validly abrogate states' sovereign immunity. 274 F.3d 974 (5th Cir. 2001). Subsequently, however, in *Tennessee v. Lane*, the Supreme Court held that the abrogation of sovereign immunity in Title II is a valid exercise of congressional power, to the extent

[9] We reject the Louisiana appellees' suggestion that a valid waiver of sovereign immunity under § 2000d-7 can occur only where federal assistance is received "under" or "pursuant to" the Rehabilitation Act. Nothing in the text of § 504 or § 2000d-7 suggests any such limitation. To the extent that the appellees' contention is based on some interpretation of the "knowing" waiver requirement, we find no support in *Pace* or any other case for the proposition that a waiver can be "knowing" only where a single statute provides for both the allocation of funds and the waiver condition.

that it "applies to the class of cases implicating the fundamental right of access to courts". 541 U.S. 509, 533-34 (2004). We have yet to decide whether the principle of *Lane* extends to cases involving other rights or, alternatively, whether our holding in *Reickenbacker* continues to control in such cases. Because Louisiana has waived its sovereign immunity from actions under § 504 of the Rehabilitation Act, we need not address that question today.

As we explained in *Pace*, the rights and remedies afforded plaintiffs under Title II of the ADA are almost entirely duplicative of those provided under § 504 of the Rehabilitation Act.[10] *See* 403 F.3d at 287-88. The only material difference between the two provisions lies in their respective causation requirements. *See id.* at 288 (citing *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500 (5th Cir. 2002)). Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ". 29 U.S.C. § 794(a) (emphasis added). By contrast, under Title II of the ADA, "discrimination need not be the sole reason" for the exclusion of or denial of benefits to the plaintiff. *Soledad*, 304 F.3d at 503-04 (*quoting Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 253 (5th Cir. 1996)).

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[10] Title II expressly provides that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [– i.e., § 504 of the Rehabilitation Act –] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title". 42 U.S.C. § 12133.

In *Pace*, we concluded that the different causation requirements were immaterial where the plaintiff's challenge was to architectural barriers. *See* 403 F.3d at 288-89. The rationale underlying this conclusion, although not expressly stated, is straightforward. In addition to their respective prohibitions of disability-based discrimination, both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals.[11] Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant.[12]

In the instant case, there is no question that the complaint claims the University's failure to provide the demanded accommodations is the sole cause of the alleged denial of benefits to the plaintiffs. That is to say, the

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[11] Title II of the ADA requires public entities to (1) make "reasonable modifications to rules, policies, or practices"; (2) "remov[e] . . . architectural, communication, or transportation barriers"; and (3) "provi[de] auxiliary aids and services", so as to enable disabled persons to participate in programs or activities. 42 U.S.C. § 12131(2). Likewise, the regulations implementing § 504 mandate that "each program or facility" to which the provision applies must be "readily accessible and usable by handicapped persons". 28 C.F.R. § 42.521(a). Covered entities may be required to facilitate access via the "acquisition or redesign of equipment, reassignment of services to accessible buildings, assignment of aids to beneficiaries, delivery of services at alternate accessible sites, alteration of existing facilities, or any other method that results in making its program or activity accessible to handicapped persons". *Id.* at § 42.521(b).

[12] In lieu of such an inquiry, the court must determine whether the requested accommodation was "reasonable" – that is, whether it would impose "undue financial or administrative burdens" or would require a "fundamental alteration in the nature of the program". *See School Board of Nassau County v. Arline*, 480 U.S. 273, 288 n. 17 (1987) (quoting *Southeastern Community College v. Davis*, 422 U.S. 397, 410, 412 (1979)).

plaintiffs claim that they were excluded from participation in their classes precisely to the extent that they were not accommodated with interpreters or note takers. The question here is not whether or to what extent the plaintiffs suffer a disability under the ADA; nor is the question whether the denial of the accommodation to that disability was caused solely or only in part by the animus of the defendants. The question is whether the failure to accommodate the disability violates the ADA; and the existence of a violation depends on whether under both the Rehabilitation Act and the ADA, the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required the defendants are liable simply by denying it. In short, causation is not the issue in the appeal presented today.[13]

Thus, having already held that sovereign immunity does not bar the appellants' claim under § 504, we need not address at this juncture the issue of abrogation under Title II of the ADA, because the rights and remedies under either are the same for purposes of this case.

III

For the foregoing reasons, we REVERSE the district court's dismissal of the appellants' claims under § 504 of the Rehabilitation Act and REMAND for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[13] While the standard of causation is not material in this appeal, we do not foreclose the possibility that, as discovery proceeds, it may become a disputed issue.

EDITH H. JONES, Circuit Judge, concurring:

I concur in the judgment and in the majority's opinion. In my view, it would have been appropriate to decide whether *Tennessee v. Lane* extends Congress's permissible abrogation of state sovereign immunity in ADA Title II beyond its precise purview, *i.e.*, the fundamental right of access to the courts, and into the field of education. *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004). *See Pace v. Bogalusa ISD*, 403 F.3d 272, 303 (5th Cir. 2005) (Jones, J., concurring in part and dissenting in part).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WENDY RENEE BENNETT-NELSON and JOY MARIE BOYKIN	CIVIL ACTION NO. 01-2166
VERSUS	JUDGE DONALD E. WALTER
LOUISIANA BOARD OF REGENTS a/k/a University of Louisiana Systems	MAGISTRATE JUDGE PAYNE

(Filed July 23, 2003)

MEMORANDUM RULING

Before this Court is a Motion to Reconsider and/or to Amend or Alter Court's Decision to Grant Defendants' Motion to Dismiss [Doc. #45] filed on behalf of plaintiffs, Wendy Renee Bennett-Nelson and Joy Marie Boykin, pursuant to Federal Rule of Civil Procedure 59(e). Defendants oppose this motion. For the reasons assigned herein, plaintiffs' motion is **GRANTED IN PART** to the extent that this Ruling supplements the Court's May 1, 2003 Memorandum Ruling, and is **DENIED** in all other respects.

Plaintiffs assert that this Court improvidently dismissed plaintiffs' Rehabilitation Act claims in light of the Fifth Circuit's ruling in *Pace v. Bogalusa City School Board,* 325 F.3d 609 (5th Cir. 2003). In particular, plaintiffs assert that "[i]n accordance with Pace Louisiana Tech University waived [its] sovereign immunity when it knowingly and voluntarily accepted *conditioned federal funds,* at a time during which the jurisprudence held that Congress, in enacting the Act, had not validly abrogated state sovereign immunity." Plaintiffs' Mem. in Support, pp.

1-2 (emphasis in original). Plaintiffs' interpretation of *Pace* would require this Court to find that a state university has waived its Eleventh Amendment immunity, and has thereby opened itself up to suits by private individuals under the Rehabilitation Act, merely by accepting **any** federal funds. This Court believes that the confines of the federal government's power under the Spending Clause dictates otherwise.

In opposing this motion, defendants assert, and this Court agrees, that plaintiffs have misinterpreted *Pace, supra,* by failing to first look to its progeny to understand precisely what analysis the Fifth Circuit "extended" to §504 of the Rehabilitation Act in *Pace,* 325 F.3d at 615. The *Pace* Court extended that part of the holding in *Pederson v. La. State Univ.,* 213 F.3d 858, 876 (5th Cir. 2000), to §504 of the Rehabilitation Act, wherein the Court stated that "in the context of Title IX, 42 U.S.C. § 2000d-7 clearly, unambiguously, and unequivocally conditions a state's receipt of federal educational funds on its waiver of sovereign immunity." *Pace,* 325 F.3d at 615. However, as discussed by defendants, the *Pederson* Court, adopting the Fourth Circuit Court of Appeals' holding and its reasoning therefor in *Litman v. George Mason University,* 186 F.3d 544 (4th Cir. 1999), *cert. denied,* 528 U.S. 1181, 120 S.Ct. 1220, 145 L.Ed.2d 1120 (2000),[1] identified a particular set of funds, the acceptance of which are conditioned upon a State's waiver of its Eleventh Amendment immunity, i.e. funding received **pursuant to** Title IX. *Pederson,* 213 F.3d at 876.

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[1] "We cannot improve on the work done by the court in *Litman,* and we therefore simply adopt its holding for all the reasons supplied in its well-crafted opinion." *Pederson,* 213 F.3d at 875-76.

In *Litman, supra,* the Court discussed the two ways a state may waive its immunity. 186 F.3d at 550. First, it may "directly and affirmatively waive its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly 'specif[ies] the state's intention to subject itself to suit in federal court.'" *Booth v. Maryland,* 112 F.3d 139, 145 (4th Cir. 1997), *quoting Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (brackets in original). Second, a state may waive its immunity by voluntarily participating in federal spending programs when Congress expresses "a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity." *Atascadero,* 473 U.S. at 247, 105 S.Ct. 3142 (ellipses in original). The test for finding such waiver "is a stringent one". *Pederson,* 213 F.3d at 875, *quoting College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 171 (1985). "[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero,* 473 U.S. at 246-47, 105 S.Ct. 3142.

The *Litman* Court recognized that Congress has the power to impose conditions on receipt of federal "gifts" pursuant to the Spending Clause. However, the State must know what funds will be lost should it choose not to accept Congress' offer.

> Because of the mutuality required in a contractual relationship of this type – the federal grant in exchange for state agreement to attached conditions – the legitimacy of the attached conditions rests on whether the State voluntarily

> and knowingly accepts the terms of the "contract". . . . Thus, Spending Clause legislation . . . presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal finds or not comply and decline the funds.

Litman, 186 F.3d at 552 (internal quotations and citations omitted).

The *Litman* Court, realizing how far Congress may use its Spending power, applied five limitations set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-11, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), to determine whether there was a valid exercise of power:

(1) The exercise of the spending power must be for the general welfare;

(2) If the grant or expenditure is, when made to the states, accompanied by conditions, the conditions must be stated "unambiguously;"

(3) Any conditions imposed must "bear some relationship to the purpose of the federal spending" so that a reasonable nexus exists between the two;

(4) the grant or expenditure and the conditions attached to it may not violate any independent constitutional prohibition; and

(5) the financial inducement offered by Congress must not be "so coercive as to pass the point at which pressure turns into compulsion."

Litman, 186 F.3d at 552-53 (internal citations omitted). These conditions, as adopted by the Fifth Circuit in *Pederson, supra*, through *Litman*, further support the proposition that when the funds are offered to the state,

(a) the state must have an opportunity to reject them, and (b) the statute must identify the funds received by the state that are subject to the condition.

The analyses and holdings of *Litman, Pederson* and *Pace* concerned funds that were identified by statute with specificity prior to receipt by the States. In other words, before George Mason University ("GMU"), in *Litman,* and Louisiana State University ("LSU"), in *Pederson,* accepted any federal education funds, they knew Title IX compliance was imperative or risk being sued in federal court. Without such a qualification, a state university would have to deny admission to students receiving federal grant money in order to retain their Eleventh Amendment immunity. This goes far beyond what this Court believes was intended by Congress's spending power and could be "so coercive as to pass the point at which pressure turns into compulsion." *Litman,* 186 F.3d at 552-53.

In *Litman, supra,* GMU acknowledged that it voluntarily accepted Title IX funding. 186 F.3d at 553. In *Pederson, supra,* the Court found that LSU waived its Eleventh Amendment immunity by accepting "federal funds under Title IX." 213 F.3d at 875. In *Pace, supra,* the Court, in essence, held that by accepting funds under §504 of the Rehabilitation Act and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, the state defendants would have waived their sovereign immunity had they known they retained any sovereign immunity to waive at the time they accepted the specified funds.[2] However, such restriction of federal education dollars spent under §504 of the Rehabilitation Act does not affect

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[2] *See Pace*, 325 F.3d at 616.

the various other programs receiving federal assistance under different programs created by Congress.

In the case *sub judice,* plaintiffs have provided this Court no evidence that the University of Louisiana System, the Board of Regents or Louisiana Tech University accepted any federal funds under §504 of the Rehabilitation Act. Louisiana Tech University has admitted it receives federal grants for research in Bioengineering and other departments conducting research. The courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights, including state sovereign immunity." *Miller v. Texas Tech University Health Sciences Center,* 330 F.3d 691, 695 (5th Cir. 2003) (internal quotations and citations omitted). In light of *Litman, Pederson* and *Pace,* this Court cannot presume that Louisiana Tech waived its Eleventh Amendment sovereign immunity by accepting federal research grants that were not made available under the Rehabilitation Act.

Accordingly, defendants, the University of Louisiana System, the Board of Regents or Louisiana Tech University, are entitled to immunity and plaintiffs' claims against them are dismissed. As indicated previously, the only remaining claims in the above-captioned matter are plaintiffs' claims against Fowler in his official capacity for injunctive relief.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WENDY RENEE BENNETT-NELSON and JOY MARIE BOYKIN	CIVIL ACTION NO. 01-2166
VERSUS	JUDGE DONALD E. WALTER
LOUISIANA BOARD OF REGENTS a/k/a University of Louisiana Systems	MAGISTRATE JUDGE PAYNE

(Filed MAY 02, 2003)

MEMORANDUM RULING

Before this Court is a Motion to Dismiss and for Summary Judgment [Doc. #17] filed on behalf of defendants, the Board of Regents, the Board of Supervisors for the University of Louisiana System, the management board for Louisiana Tech University, the State of Louisiana and William Carver Fowler, individually and in his official capacity as an employee of Louisiana Tech University, pursuant to Federal Rule of Civil Procedure 56. Plaintiffs oppose this motion. For the reasons assigned herein, defendants' motion is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT OF THE CASE

Plaintiffs, both hearing impaired students, bring this action against defendants asserting violations of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42

U.S.C. § 12101, *et seq*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq*.[1] In particular, plaintiffs assert that they were denied equal access to education because they were not provided educational aids, such as interpreters and note takers, and services in a timely and effective manner.

Defendant, the Board of Regents, asserts that it has no role in the management of the institutions under its control. Thus, plaintiffs have no claim against it for an institution's alleged failure to provide reasonable accommodations to its hearing-impaired students. Plaintiffs agree and have no opposition to dismissing the Board of Regents. Accordingly, the claims against the Board of Regents are dismissed.

Defendants, the Board of Supervisors for the University of Louisiana System, the management board for Louisiana Tech University ("La Tech"), and the State of Louisiana, assert that actions for monetary damages under the ADA and the Rehabilitation Act are barred by the Eleventh Amendment. Plaintiffs counter that because La Tech has accepted federal funding, La Tech has waived Eleventh Amendment immunity. Defendant, Fowler, in his

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[1] In their Opposition to defendants' Motion to Dismiss and for Summary Judgment and their Pretrial Order, plaintiffs also assert claims under the Louisiana Constitution. Plaintiffs' only reference to state law claims in their Complaint and First Supplemental and Amending Complaint is a paragraph invoking the court's supplemental jurisdiction for "claims arising under State law." Complaint, ¶2; First Supp. and Amending Complaint, ¶2. This Court finds this general averment fails to meet the "notice pleading" requirement and is insufficient to put defendants on notice that plaintiffs intended to pursue state constitutional claims. See Fed. R. Civ. P. 8. Accordingly, these claims are dismissed.

individual capacity, alleges the same immunity along with immunity under La. R.S. 9:2798.1. Fowler asserts that plaintiffs' official capacity claims against him should be dismissed because he fulfilled his duties to plaintiffs under the ADA and Rehabilitation Act. In other words, he asserts he provided reasonable accommodations for plaintiffs' disabilities.

Plaintiff, Wendy Renee Bennett-Nelson ("Bennett-Nelson") is currently enrolled at La Tech. Defendants' Statement of Uncontested Facts ("SUF"), ¶4; Plaintiffs' Response to Defendants' SUF, ¶4. Joy Marie Boykin ("Boykin") was enrolled at La Tech. Id. Both Bennett-Nelson and Boykin have hearing impairments that require them to seek special assistance from La Tech. Defendants' SUF, ¶5; Plaintiffs' Response to Defendants' SUF, ¶5. Defendants assert they provided note takers and interpreters for classes in which plaintiffs were enrolled in an attempt to accommodate plaintiffs' disabilities. Deposition of William Fowler, p. 25. Plaintiffs assert that defendants failed to fulfill their obligations because note takers and interpreters were not provided at all times. Plaintiffs further assert that the recommendations made by Fowler to plaintiffs to compensate for lack of, or inadequate, note takers and/or interpreters, were insufficient to meet plaintiffs' needs.

MOTION TO DISMISS STANDARD

Under Fed. R. Civ. P. 12(b)(6), a defendant may seek dismissal of a complaint based on the "failure to state a claim upon which relief can be granted." When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the

plaintiff; assuming all factual allegations to be true. See *Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Lowrey v. Texas A & M Univ. System*, 117 F.3d 242, 247 (5th Cir. 1997).

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.*

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999). The moving party is not required to negate the elements of the non-moving party's case. *Lawrence*, 163 F.3d at 311. However, where the moving party bears the burden of proof on an issue, it must produce evidence

that would, if uncontroverted at trial, warrant a judgment as a matter of law. *International Short Stop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936 (1992).

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a Statement of Uncontested Facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2W requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for the purposes of the motion, unless specifically denied." Local Rule 56.2W.

LAW AND ANALYSIS

I. ADA and Rehabilitation Act Claims Against the Board of Supervisors for the University of Louisiana System, the management board for La Tech, and the State of Louisiana are Barred by the Eleventh Amendment.

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

The Eleventh Amendment textually extends sovereign immunity only to suits against a State by citizens of another state. However, the Eleventh Amendment also confirms that the Constitution's grant of judicial power did not contemplate suits against sovereign States without their consent. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001).

The Supreme Court has recognized that Congress may abrogate a State's immunity but their authority is limited. To abrogate the State's Eleventh Amendment immunity, Congress must (1) unequivocally express its intent to abrogate immunity, and (2) act pursuant to a valid exercise of power. *Kimel*, 528 U.S. at 73. It is undisputed that both the ADA and the Rehabilitation Act meet the first requirement. *See* 42 U.S.C. § 12202 ("A State shall not be

immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."; *see also* 42 U.S.C. § 2000d-7(a) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act[2] . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance"). The sole issue before this Court as to the Board of Supervisors for the University of Louisiana System, the management board for La Tech, and the State of Louisiana is whether, in abrogating the State's immunity under both the ADA and the Rehabilitation Act, Congress acted pursuant to a valid exercise of power. For the reasons that follow, this Court finds that it has not.

In enacting Title II of the ADA, Congress purported to rely on its authority under both the Commerce Clause of Article I and §5 of the Fourteenth Amendment. *See* 42 U.S.C. § 12101(b)(4) (invoking the "sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities"). To the extent that Title II rests on Congress's authority under the Commerce Clause, it cannot validly

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[2] Section 504(a) of the Act provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).

abrogate state sovereign immunity. This is because "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 364, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001); *see Kimel*, 528 U.S. at 79, 120 S.Ct. 631 ("Under our firmly established precedent, then, if the [Age Discrimination in Employment Act of 1967] rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers"); *see also Seminole Tribe*, 517 U.S. at 72-73, 116 S.Ct. 1114 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").[3]

"Section 5 of the Fourteenth Amendment[4], however, does grant Congress the authority to abrogate the States' sovereign

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[3] Plaintiffs cite *United States of America v. Mississippi Dept. of Public Safety*, 321 F.3d 495 (5th Cir. 2003) for the proposition that Congress had the authority to enact Title II of the ADA pursuant to the Commerce Clause. In *Mississippi Dept. of Public Safety*, the Court addressed whether the Eleventh Amendment barred suits by the Federal government against a state; the Court determined that it did not bar such suits. 321 F.3d at 499. The Fifth Circuit next addressed whether the ADA, as applied to the states, is an unconstitutional exercise of Congressional authority. *Id.* The Court only reached this second issue because it held that the Eleventh Amendment did not bar the Federal government's suit. Thus, *Mississippi Dept. of Public Safety, supra*, is distinguishable and inapplicable to the case *sub judice*.

[4] Section 1 of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Continued on following page)

immunity." *Kimel*, 528 U.S. at 80, 120 S.Ct. 631; *see also City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Accordingly, the ADA and Rehabilitation Acts[5] can apply to the States only to the extent that the statutes are appropriate §5 enforcement legislation.

In *Reickenbacker, supra*, the Fifth Circuit clearly held that Congress did not validly act through its Fourteenth Amendment §5 power to abrogate state sovereign immunity when it enacted Title II of the ADA and §504 of the Rehabilitation Act. 274 F.3d at 984. The answer is clear as to plaintiffs' claims under the ADA – defendants are entitled to Eleventh Amendment sovereign immunity based on *Reickenbacker*. However, the Court created a question where one does not exist when it declined to reach the issue of whether Louisiana waives its sovereign immunity under the Rehabilitation Act by accepting federal monies. *Id.* at 984.

Plaintiffs assert that defendants have waived their sovereign immunity under the Rehabilitation Act because they received federal funds. Plaintiffs rely on pre-*Reickenbacker* jurisprudence, namely *Lane v. Pena*, 518 U.S. 187, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996), in support of this proposition. Plaintiffs argue that *Lane* controls the Rehabilitation Act issue since the Fifth Circuit declined to address the issue in *Reickenbacker*.

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting "appropriate legislation." *See City of Boerne*, 521 U.S. at 536, 117 S.Ct. 2157.

[6] In *dicta*, the *Reickenbacker* Court indicated that because Title II of the ADA and §504 of the Rehabilitation Act offer virtually identical protections, the abrogation analysis is the same. 274 F.3d at 977 n. 17.

This Court finds that *Lane, supra*, is not applicable to the case *sub judice*.

In *Lane*, the Court stated ***in dicta*** that by enacting 42 U.S.C. § 2000d-7, the "equalization" provision, Congress created an unambiguous waiver of sovereign immunity under the Rehabilitation Act for states that accept federal monies. 518 U.S. at 198, 116 S.Ct. at 2099. The issue actually before the *Lane* Court, however, was whether Congress created an unequivocal abrogation of the **federal government's** sovereign immunity against damages awards in 42 U.S.C. § 2000d-7 for violation of the Rehabilitation Act. *Id.* at 191, 116 S.Ct. at 2096. The Court ultimately held that the statute's reference to "public entities" was ambiguous as to whether it included federal Executive agencies. Thus, the statute could not be held to be an unequivocal waiver of immunity. *Id.* at 200, 116 S.Ct. at 2100. *Lane* never addressed whether Congress' abrogation of immunity in the Rehabilitation Act was a valid exercise of Congressional authority.

One year after *Lane*, the Supreme Court decided *City of Boerne*, 521 U.S. at 536, 117 S.Ct. 2157.[6] The *City of Boerne* Court required that to uphold the validity of Fourteenth Amendment §5 legislation that reaches beyond the scope of §1's actual guarantees, a party must show (1) a pattern of discrimination, and (2) a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Id.* at 530-34, 117 S.Ct. at 2169-71.

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[6] *City of Boerne* addressed whether Congress had the authority to enact the Religious Freedom Restoration Act of 1993 ("RFRA").

In *Garrett, supra*, the Supreme Court decided that although Title I[7] of the ADA has an unequivocal expression of abrogation of the states' Eleventh Amendment immunity, Congress did not have the power to waive that immunity under §5 of the Fourteenth Amendment. *Id.* at 374, 121 S.Ct. at 967-68. In particular, the Court held that:

> [I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here . . .

Id. The sticking point for the *Garrett* Court was that the ADA did not meet the *City of Boerne* test.

Despite multiple examples of discrimination against the disabled, the *Garrett* Court determined that Congress never found and/or relied on pervasive discrimination against the disabled in the employment arena **by the States**. 531 U.S. at 368-72, 121 S.Ct. at 964-67. Congress's §5 authority is appropriately exercised only in response to state transgressions. *Id.* at 368, 121 S.Ct. at 964. In other words, Congress cannot attempt to fix something that was not broken.

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[7] The *Garrett* Court dealt solely with Title I of the ADA, and specifically declined to address Title II. However, the Fifth Circuit relied on the analysis in *Garrett* to determine whether Title II of the ADA and §504 of the Rehabilitation Act validly abrogated Eleventh Amendment sovereign immunity in *Reickenbacker*. Accordingly, this Court will do the same.

The *Garrett* Court also determined that the duties imposed by the ADA, if applied to the States, far exceed what is constitutionally required by *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).[8] The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. *See Garrett*, 531 U.S. at 367, 121 S.Ct. at 964.

The underlying premise of the guiding jurisprudence is that by requiring Congress to establish a pattern of unconstitutional discrimination in violation of the Fourteenth Amendment, and then to set up a solution that is congruent and proportional to the need, the Supreme Court said that Congress cannot create solutions for States and their agencies where no problem is found to exist. The Rehabilitation Act, like the ADA, attempts to create a solution without a known problem. Plaintiffs have provided this Court no evidence to the contrary.

The Rehabilitation Act prohibits discrimination against the disabled by programs that receive federal funds. Plaintiffs have provided this Court no evidence to establish that Congress, in enacting the Rehabilitation Act, examined and found a pattern of discrimination against the disabled by the States or their agencies. The jurisprudence is clear that because no such finding was made by Congress, and because Congress's solution far exceeded the need, Congress did not have the authority to

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[8] *City of Boerne, supra*, confirmed that the Court, not Congress, has the responsibility to define the substance of constitutional guarantees. 521 U.S. at 519-24, 117 S.Ct. 2157.

abrogate the States' sovereign immunity under the Rehabilitation Act. Accordingly, it is irrelevant whether defendants accepted federal funds, and the Board of Supervisors for the University of Louisiana System, the management board for La Tech, and the State of Louisiana are entitled to immunity against plaintiffs' Rehabilitation Act claims as well.

II. ADA and Rehabilitation Act Claims Against William Fowler.

Insofar as plaintiffs are suing Fowler in his individual capacity, neither Title II of the ADA nor §504 of the Rehabilitation Act provides for individual capacity suits against state officials. *See Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999) (Rehabilitation Act); *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn* 280 F.3d 98, 107 (2nd Cir. 2001); *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) (Title II), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1188, 149 L.Ed.2d 104 (2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8 (8th Cir.1999) (en banc) (Title II); *Calloway v. Boro of Glassboro Dep't of Police*, 89 F.Supp.2d 543, 557 (D.N.J.2000) (Title II and § 504) (collecting similar cases); *Montez v. Romer*, 32 F.Supp.2d 1235, 1240-41 (D.Colo.1999) (Title II and § 504). Accordingly, Bennett-Nelson and Boykin's individual capacity claims against Fowler must be dismissed.

Fowler asserts that in his official capacity he is entitled to immunity for his actions in attempting to accommodate plaintiffs. The Supreme Court has determined that a suit against a state official seeking to enjoin that official's allegedly unconstitutional act or violation of a federal statute is not considered to be a suit against the

State, and thus, is not barred by the Eleventh Amendment. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (U.S.Mich.,1989); *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984); *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454, 52 L.Ed. 714 (1908). Accordingly, Fowler is not entitled to Eleventh Amendment immunity.

After having reviewed the evidence provided by all parties, this Court finds that genuine issues of material fact remain as to Fowler's potential liability in his official capacity. Defendants' Motion to Dismiss and for Summary Judgment as to plaintiffs' claims against Fowler in his official capacity is denied.

CONCLUSION

For the reasons stated above, plaintiffs' claims against the Board of Regents are dismissed, as are plaintiffs' state law claims. Plaintiffs' ADA and Rehabilitation Act claims against the Board of Supervisors for the University of Louisiana System, the management board for La Tech, and the State of Louisiana are also dismissed. Further, plaintiffs' ADA and Rehabilitation Act claims against Fowler in his individual capacity are dismissed. Thus, the only remaining claims are plaintiffs' claims against Fowler in his official capacity for injunctive relief.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES
DISTRICT JUDGE

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